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SURVEY OF CERTAIN REGULATION FOR INSOLVENCY OFFICEHOLDERS

To	**Insol Europe - Insolvency Officeholders Forum**
From	**Bart De Moor**
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Subject	**Insol Europe Survey - insolvency regulation in Belgium**

I. INTRODUCTION

In Belgium insolvency situations are governed through separate laws, all providing for specific types of proceedings. These are all proceedings as referred to in article 2 (a) of the European Insolvency Regulation 1346/2000. Through the insolvency process of a company, transition from one type of proceeding to another is possible, often causing some difficulty as the provisions of these laws are not always fully compatible.

A main distinction is made between proceedings involving the winding-up of a company and proceedings aiming at the reorganisation and turnaround of a company. The proceedings as referred to by article 2 (a) of the European Insolvency Regulation are for Belgium:

- Bankruptcy proceedings,
- Judicial reorganisation through a vote on a restructuring plan,
- Judicial reorganisation through a transfer of undertakings,
- Insolvency proceedings for non-commercial individuals,
- Voluntary liquidation,
- Judicial liquidation,
- Provisional dispossession of the directors.

II. TYPES OF INSOLVENCY OFFICE HOLDERS

The type and role of the insolvency office holders varies depending on the insolvency procedure type.

1. Bankruptcy proceedings

Once the court takes the decision to declare a company bankrupt, the management or board of directors is dispossessed and a bankruptcy liquidator is appointed by the court who takes over all powers, under the control of a supervisory judge and the commercial court.

The bankruptcy liquidator realises the assets of the debtor and then distributes the proceeds taking into account the privileges and securities of the creditors. Ongoing contracts can be terminated by law or by the liquidator or continued, depending on the decision of the liquidator, taking into account the interest of the estate.

In case the activities or part of these can be continued and transferred to another entity, the liquidator can be authorised by the commercial court to continue the business. This is subject to the condition that the continuation is not detrimental to the creditors. That is rarely done as the liquidator is personally liable for the loss of value for the creditors should the transfer of undertakings not be successful or should the continuation of the business generate more costs than profits. Therefore liquidators will require financial guarantees from candidate purchasers who wish that the liquidator continues the business while the transfer is negotiated.

2. Judicial reorganisation through a vote on a restructuring plan

This type of judicial reorganisation aims at negotiating an amicable settlement between the debtor and two or more of its creditors, ending with the creditors voting on the restructuring plan.

The rule is that the court will not appoint an administrator. Only when the debtor requests the appointment of a judicial administrator and if this is considered to be useful to obtain the goal of the reorganisation procedure, then the court will appoint a judicial administrator who will assist the debtor during the reorganisation proceedings. In addition, each interested third party can request the court to appoint a judicial administrator. In this case, the interested third party will bear the costs and fees of the judicial administrator.

In case the debtor or its directors engage in serious misconduct, the court can appoint one or more judicial administrators, whose mission will be determined by the court.

3. Judicial reorganisation through a transfer of undertakings

In case the court opens a judicial reorganisation proceeding by way of a transfer of undertakings, the court will appoint a judicial administrator who will organise the sale and transfer under the courts' supervision. The judicial administrator is only responsible for the transfer of undertakings. He does not replace the management and directors who remain in charge to manage and represent the company towards third parties.

During the transfer process, the court's representative must prioritise the maintenance activity while considering the rights of the creditors. If comparable offers are made for the transfer of undertakings, priority must be given to the preservation of employment.

4. Insolvency proceedings for non-commercial individuals

In case the court opens a collective debt settlement procedure, a debt mediator is appointed. His role is to collect all the information regarding the debts of the individual, receive his income and to draft and execute an instalment plan.

5. Voluntary liquidation

The shareholders of a company can voluntary decide upon the dissolution of the company. After its dissolution, the company is deemed to continue to exist for the purpose of its liquidation.

In principle, the liquidators are appointed by the shareholders. It happens that the shareholders appoint the existing directors as liquidators, since they are most familiar with the company's business and financial position. Another possibility is to appoint external liquidators (such as attorneys or accountants). The powers of these liquidators must be regarded in function of the limited capacity the company enjoys, once the decision to wind up has been taken. The liquidators will only have those powers which are required in order to bring the liquidation to an end, but nothing more.

Liquidation means the selling of the company's assets by the liquidator. The proceeds of the sales shall be distributed by the liquidator for payment of the creditors, for restitution of the capital contributions of the shareholders, and for distribution of the profits and capital gains, if any, among the shareholders.

6. Judicial liquidation

Under Belgian law there are basically three occurrences under which a company can be liquidated through a court judgement. In these situations, the court can order the liquidation of the company, independently of the company being insolvent or not, and appoint a judicial liquidator.

The commercial court can order the judicial liquidation of a company for serious reasons, upon the request of any shareholder. Serious reasons are described in the Companies Code as the fact that another shareholder does not respect its obligations or when illness prevents the shareholder to manage the affairs of the company, or any other similar case. It is up to the court to decide whether or not the reason invoked by a shareholder is serious enough to decide upon the dissolution of the company.

Secondly, if the value of the net assets of the company has fallen below the minimum capital amount, any interested stakeholder is entitled to ask the court to order the dissolution and liquidation of the company.

Finally, in case the company did not file its annual accounts for three consecutive years, any interested third party or the public prosecutor can request that the company be liquidated under court supervision, unless this situation is resolved before the liquidation has been ordered.

The court will appoint a liquidator whose role is the same as the liquidator appointed in the voluntary liquidation.

7. Provisional dispossession of the directors

In case there exist serious doubts that the debtor is virtually bankrupt, the commercial court can suspend the debtor's rights and appoint a provisional administrator to represent the debtor. The court can act ex officio or upon request of a creditor. This suspension will automatically end after a period of fifteen days unless the provisional administrator or the creditor files a request with the court to have the company declared bankrupt.

A similar provision is provided for in the law on the continuity of enterprises, being understood that the aim of the appointment of the provisional administrator is to contribute to the company's turnaround and not its liquidation.

The precise role of the provisional administrator will be defined in the judgement.

III. SIZE OF THE PROFESSION

There are no restrictions on the size of the profession, other than the qualifying requirements for authorisation and acceptance of appointments detailed below. In Belgium, there are no official figures available regarding the number of IOHs. As the practice of IOHs is not regulated in a uniform manner, IOHs have all type of different backgrounds.

1. Bankruptcy liquidator

The Belgian Bankruptcy Act provides that a bankruptcy liquidator must be an attorney registered on a court list of qualified bankruptcy liquidators. In Belgium there are no national records indicating the number of attorneys who take up the mandate of bankruptcy liquidator.

2. Judicial administrator

The Act on the Continuity of Enterprises only provides that the judicial administrator must be competent, experienced, independent and impartial. Contrary to the rule for bankruptcy proceedings, not only attorneys are allowed to take up the mandate of judicial administrator. However, the court will appoint usually an attorney as judicial administrator. In Belgium there are no national records indicating the number of practitioners who take up the mandate of judicial administrator in a reorganisation procedure.

3. Debt mediator

The judicial code provides that only attorneys, law officials (notaries public, bailiffs), public administrations or private institutions duly authorised for that purpose can be appointed as debt mediators. In Belgium there are no national records indicating the number of practitioners who take up the mandate of debt mediator. Some bar associations make the list of the debt mediators publicly available.

4. Liquidator in a voluntary liquidation

In principal, anyone can be appointed as a liquidator. However, the ethical rules of some professions (such as notaries and bailiffs) forbid to take up the mandate of a liquidator. Therefore, mainly attorneys and accountants, auditors and other number specialists take up the mandate of liquidator.

5. Provisional administrator

Who can be appointed as a provisional administrator is not defined by law. In general, attorneys, accountants, auditors and other number specialists are appointed as provisional administrators.

IV. PRACTISING NORMS

IOHs range from partners of global accountancy and law firms to sole practitioners who run their own small and micro-businesses. In between these extremes, there are many medium sized firms, either specialising in restructuring and insolvency work, or providing such services as part of a range of legal, accountancy, audit and other financial services.

V. QUALIFICATION TRAINING AND ENTRY INTO THE PROFESSION

In Belgium, there is no uniform regulation. The requirements differ in function of the type of IOH.

1. Bankruptcy liquidator

The Bankruptcy Act provides that bankruptcy liquidators are chosen from a list kept by the commercial courts. Only attorneys registered with a Belgian bar can appear on this list. They must have attended a special training and must show that they have the competence to handle bankruptcy proceedings. The Bankruptcy Act is very vague as it is not defined which “special training” one must have attended, neither how the bankruptcy liquidator can show that he has the required competence. A potential bankruptcy liquidator must prepare a file and submit his file to the general assembly of the commercial court. The general assembly will then decide whether or not the attorney will be registered on the list of bankruptcy liquidators. The special training can be a post university degree, a cycle of seminars regarding insolvency, profound studies during the master of law, etc. The required experience is assessed in function of the experience of the attorney, whether or not he has sufficient administrative support and has a professional insurance.

2. Judicial administrator

Compared to bankruptcy proceedings, there are relatively few judicial reorganisation proceedings. In principle, only in case of a judicial reorganisation aiming at a transfer of undertakings, the court will appoint a judicial administrator. The IOH of judicial administrator is therefore not a recurring appointment. The law does not provide a specific training, nor conditions for the entry to profession.

3. Debt mediator

To be appointed as a debt mediator, the social worker or attorney must show three years of relevant experience or has to attend a special training of at least sixty hours.

4. Liquidator

The Belgian Companies Code does not describe the qualifications required to undertake the liquidator role. The only control there is, is that the court must approve the appointment of the liquidator and will check whether the liquidator is suited to take up the mandate of liquidator.

5. Provisional administrator

The requirements to take up the role of provisional administrator are not defined by law. Taking into account that the provisional administrator is appointed by the president of the court, the president will verify whether the appointed provisional administrator is suited for the role.

VI. PROFESSIONAL BODIES

IOHs in Belgium are not members of a specialist profession, but of a subset of another (e.g. attorneys or accountants). There is no specific body of insolvency practitioners. IOHs are typically members of one of the following professional bodies:

- Attorneys: local bar association such as the Brussels bar (°1916)
- Accountants: Association of Accountants and Tax Consultants (IAB) (°1999)
- Auditors: Association of Auditors (IBR) (°1953)
- Bailiffs: National Chamber of Bailiffs (°1954)
- Notaries public: National Chamber of Notaries Public (°2000)

These are all long established professional bodies which undertake regulatory activity. These professional bodies set and enforce minimum professional standards, specifying ethical standards, requiring members to undertake a minimum annual continued professional education, etc.

VII. CONTINUING PROFESSIONAL EDUCATION

There are no specific requirements for IOHs that they must continue to demonstrate they are maintaining their fitness to practice via continuing professional education. These requirements do however exist for attorneys, bailiffs, notaries public and number specialists as imposed by their professional bodies.

VIII. BODY CORPORATE OR INDIVIDUAL

Except for liquidators in a voluntary liquidation, all other IOHs are individuals that take appointments either singly or jointly in a personal capacity.

IX. SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORISATION

As all the IOHs are either appointed by the court or a court approval must follow after the appointment, it is not possible that a non-authorized person will take up the mandate of a IOH. If a creditor or any other interested third party is of the opinion that the IOH is not doing a good job, it will be possible to request the court to revoke the IOH.

X. BONDING AND INSURANCE

1. Bankruptcy liquidator

The Bankruptcy Act does not provide for the obligation to subscribe a professional indemnity insurance. However, most commercial courts will request the bankruptcy liquidators to subscribe such insurance. A limited number of insurance companies provide insurance policies “judicial administrator”, which cover possible liability of bankruptcy liquidators, judicial administrators of reorganisation proceedings as well as liquidators. Bankruptcy proceedings of large companies may require a specific insurance policy that will be paid by the debtor. The insurance premiums will, in case of agreement of the supervisory judge, be a debt of the estate.

2. Judicial administrator

The Act on the Continuity of Enterprises does not provide for the obligation to subscribe a professional indemnity insurance. It is however strongly recommended for the judicial administrator to subscribe such insurance. A limited number of insurance companies provide insurance policies which cover possible liability of bankruptcy liquidators, judicial administrators of reorganisation proceedings as well as liquidators. Reorganisation proceedings of large companies may require a specific insurance policy that will be paid by the debtor.

3. Debt mediator

The Judicial Code does not provide for the obligation to subscribe a professional indemnity insurance.

4. Liquidator

The Companies Code does not provide for the obligation to subscribe a professional indemnity insurance. It is however strongly recommended for the liquidator to subscribe such insurance. In case the company in liquidation agrees, the insurance premiums can be paid by the company in liquidation.

5. Provisional administrator

The provisional administrator appointed based on the provisions in the Bankruptcy Act must be insured against professional indemnity. The Act on the Continuity of Enterprises does not provide such an obligation.

XI. APPOINTMENT OF IOHS

As a general rule, IOHs are chosen because of their experience and reputation, however the following provide further details by type of IOH.

1. Bankruptcy liquidator

The bankruptcy liquidator is appointed by the court out of a list of qualified bankruptcy liquidators.

2. Judicial administrator

The judicial administrator is appointed by the court.

3. Debt mediator

The debt mediator is appointed by the court out of a list of qualified debt mediators.

4. Liquidator

In a voluntary liquidation, the liquidator is appointed in complete freedom by the shareholders, but this appointment must be ratified by the court. In a judicial liquidation, the liquidator is appointed directly by the court.

5. Provisional administrator

In case of dispossession of the directors, the provisional administrator is appointed by the court.

XII. REMUNERATION

1. Bankruptcy liquidator

The fee of the bankruptcy liquidator is a percentage calculated on the assets sold. The fee of the bankruptcy liquidator takes into account the importance and complexity of the case. The rules and scales are fixed by royal decree and it also sets out which costs are separately indemnified.

2. Judicial administrator

The judicial administrator must agree upon a remuneration, in general hourly rates, with the debtor which is afterwards assessed by the court. The judicial administrator can request the debtor a payment in advance which cannot exceed 75% of the total amount of the fees of the judicial administrator.

3. Debt mediator

In the case of judicial mediation the costs which a debt mediator can claim from the insolvent person and the remuneration of the mediator responsible for the person in question correspond to fixed amounts determined by royal decree. The breakdown of these costs and remuneration established by the mediator is checked by the court. During the procedure, the mediator must withhold an amount from the income of the insolvent person. In the event that the insolvent person is totally insolvent the debt mediator's costs may be paid in full or in part by the Fund for Dealing with Over-indebtedness.

4. Liquidator

In a voluntary liquidation, the liquidator must agree upon a remuneration with the debtor. In general, the parties agree on an hourly rate. Especially in case of insolvent voluntary liquidations, it is important to provide that the parent company or shareholders guarantee the payment of the liquidator's fees. In a judicial liquidation, the remuneration of the liquidator is determined by the court. The liquidator must then obtain payment from the company in liquidation.

5. Provisional administrator

In case of dispossession of the directors, the provisional administrator receives a remuneration from the company, based on an hourly rate.

XIII. PERSONAL LIABILITY OF IOHS

Such as each professional, the IOH is liable for any misconduct during the performance of his mandate.

A particular liability is that of the bankruptcy liquidator when he decides to continue the activities after the opening of the bankruptcy proceedings. He can be held personal liable for a possible increase of the debts of the bankrupt company. This is the reason why the bankruptcy liquidator will request a guarantee from one or several possible purchasers who show interest in the continuation of the activities.

XIV. RELEASE OF IOHS FROM LIABILITY

At the end of the mandate, the judicial administrators and the liquidators of a voluntary liquidation will request release from liability and taxation of their fees and costs.

XV. INDEPENDENCE

Except for the liquidator appointed by the shareholders, all the IOHs have the duty to act in full independence from the debtor.
